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MOHD. YUSOF BIN ABDUL GHANI

v.

TEE SONG KEE & ANOR.

b

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL SUIT NO. 23-16-1994 (T)]
20 MAY 1995

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TORT: Road accident - Vehicles travelling in opposite directions - Both parties alleging encroachment - Plaintiff giving three different versions of how the accident occurred - Demeanour of witnesses - Use of sketch plan & key and photographs - Inferences to be drawn from the totality of the evidence adduced

PRACTICE & PROCEDURE: Road accident - Claim for damages - Plaintiff's statement of claim pleading total negligence against second defendant - Failure to plead contributory negligence - Effect.

d

EVIDENCE: Road accident - Plaintiff alleging that taxi driver witnessed accident - Taxi driver not called as a witness - Whether affidavit sworn by taxi driver can be tendered as an exhibit - Consideration of s. 73A(1)(b) of the Evidence Act 1950 and the proviso thereto.

e

DAMAGES: Road accident - Claim for damages - Loss of earnings - Whether distinction to be made between pre-trial and post-trial loss of earnings - Consideration of s. 28A Civil Law Act 1956 - Loss of earning capacity - Application of the principle in *Moeliker v. R. Reyrolle & Co. Ltd.* - Cost of nursing care - Principles applicable - Damages for pain & suffering and loss of amenities.

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This is a claim by the plaintiff for special and general damages for pain suffering and loss of amenities sustained as a result of a collision between the plaintiff's motor-cycle and the second defendant's motorcar. This claim by the plaintiff was first heard before the High Court at Ipoh wherein the learned Judge had found the defendants 5/6 negligent and the plaintiff 1/6 contributorily negligent. The decision of the learned High Court Judge was reversed on appeal and the then Supreme Court ordered a retrial before another Judge.

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The plaintiff claimed that on or about 23 November 1986 while he was riding motorcycle No. ABF 4561 from the direction of Kamunting to the direction of Batu Kurau, a collision occurred between his motorcycle and motorcar AAY 1675 driven by the second defendant that came from the opposite direction. The plaintiff claims that as he was negotiating a bend the second defendant encroached into his path and collided into him. The plaintiff pleaded total negligence against the defendants.

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During the course of the trial it was established that the plaintiff had given 3 different versions of the accident. The first version was as stated in the plaintiff's police report wherein the plaintiff stated he did not know what happened to him. The 2nd version was in the High Court Ipoh when the plaintiff testified that the motorcar encroached into his side of the road and collided into him. The third version was in the Magistrate's Court Taiping where the plaintiff testified that the road was slippery and he lost control of his motorcycle and fell.

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The second defendant testified that as the plaintiff was negotiating a bend the plaintiff's motorcycle fell on its left side and skidded onto his path of travel and knocked into his motorcar. The sketch plan and key showed a scratch mark starting from the plaintiff's side of the road and ending on the second defendant's side of the road. The photographs taken of the scene of the accident further showed the motorcycle lying on its left side.

According to the plaintiff, the taxi driver who took him to hospital witnessed the accident and the plaintiff sought to adduce an affidavit made by the said taxi driver as an exhibit, without having to call the taxi driver as a witness.

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As a result of the accident the plaintiff who was 24 years old and working as a teacher suffered severe injuries and beside claiming for pain and suffering the plaintiff also claimed for loss of earnings, loss of earning capacity and cost of nursing care.

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Held:

[1] From the evidence, both parties blamed each other for the accident. It is quite common for both parties to give diametrically opposing evidence and, in such a situation, the only way to resolve the impasse and to ascertain how the collision occurred was to consider the photographs, plan and measurements of the scene and the nature of the damage to each vehicle, which provide the most relevant guide by which the opposing evidence could be tested.

c

[2] The plaintiff had given 3 different versions of the accident. The sketch plan and key showed a scratch mark stretching from the plaintiff's side of the road onto the second defendant's path of travel. The sketch plan and key supported the second defendant's version that the plaintiff's motorcycle fell at the bend causing the motorcycle to skid and encroach into the second defendant's path of travel. The police photographs showed the motorcycle lying on its left side and this was consistent with the evidence of the second defendant that the motorcycle fell on its left side. There was further undisputed evidence that the motorcycle was not moved after the accident and the position of the motorcycle as reflected in the sketch plan located more to the lawful path of the second defendant and all these tell a damning story as to the negligence of the plaintiff. In the circumstances it was clear that the plaintiff had failed to show negligence on the part of the second defendant.

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[3] The plaintiff had failed to plead contributory negligence and instead pleaded total negligence against the second defendant driver. The law is clear that in all cases of negligence the onus of proof rests with the party who asserts. On the evidence adduced the plaintiff had hopelessly failed to establish any negligence on the second defendant's part and the plaintiff's claim must accordingly be dismissed with costs.

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[4] The proviso to s. 73A(1)(b) of the Evidence Act 1950 envisages the situation that the maker of a document need not be called as a witness, *inter alia*, if all reasonable efforts to find him have been made without success. Although evidence has been given that the taxi driver could not be located, before the affidavit of the taxi driver could be marked as an exhibit under the above proviso, the process server should give evidence to show that attempts to trace the taxi driver were made without success. Bereft of the evidence of the process server the proviso cannot come into play.

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[5] On the question of quantum of damages, on the basis of full liability, under the amendment to the Civil Law Act in 1984 there is no longer any distinction between pre-trial and post-trial loss of earnings. In the circumstances, the plaintiff's claim for loss of earnings of RM640 pm for 20 months was subject to a deduction of RM320 pm being the plaintiff's living expenses as provided for under s. 28(A) of the Civil Law Act 1984.

h

[6] Translating the principle enunciated in *Moeliker v. R. Reyrolle & Co. Ltd.* to the facts of the present case, there was not an iota of evidence to show that there is a substantial, let alone a real risk, that the plaintiff would lose his Government job as a teacher at some time before the estimated end of his working life. Bereft of this kind of evidence and based on the available evidence, the plaintiff has not proved his entitlement to loss of earning capacity and no award could therefore be made under this head.

i

- a** [7] The plaintiff was 24 years old at the time of the accident. Although the plaintiff's brother-in-law, who it was said was looking after him, did not give evidence, it was clear that the plaintiff needed nursing care. In the circumstances, RM200 pm was allowed for nursing care for a period of 16 years which gave a figure of RM38,400. The general damages for pain and suffering for laceration and abrasions and fracture dislocation of the 5th. cervical vertebra resulting in the plaintiff being wheelchair bound were assessed at RM1,500 and RM90,000 respectively.
- b**

[Plaintiff's claim dismissed with costs].

Cases referred to:

- Wong Ah Sing v. Government of Singapore & Ors.* [1968] 1 MLJ 1 (*refd*)
- Haron v. Macaulay* [1969] 1 MLJ 169 FC (*refd*)
- c** *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor.* [1976] 1 MLJ 252 CA (*refd*)
- Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85 (*refd*)
- Wan Norsiah binte Wan Abdullah v. Che Harun bin Che Daud* [1980] 1 MLJ 237 (*refd*)
- Mohd. Tajuddin bin Salleh v. Mokhari bin a/l Murgis & Anor.* [1993] 3 CLJ 42 (*refd*)
- San Seong Choy & Ors. v. Yusof Bien* [1962] MLJ 427 (*refd*)
- Neo Chan Eng v. Koh Yong Hoe* [1960] 26 MLJ 291 (*refd*)
- Ng Chui Sia v. Maimon bt Ali* [1983] 1 MLJ 110 (*refd*)
- d** *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ FC 175 (*refd*)
- Ah Mee v. Public Prosecutor* [1967] 1 MLJ 220 (*refd*)
- Govinda Raju v. Laws* [1966] 1 MLJ 188 (*refd*)
- Menah binti Sulong v. Lim Soo & Anor.* [1983] 1 CLJ 26 (*refd*)
- Public Prosecutor v. Bhandulananda Jayatilake* [1981] CLJ 43 (*refd*)
- Tay Tong Chew & Anor. v. Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50 (*refd*)
- Dirkje Peiternella Halma v. Mohd. Noor bin Baharom & Ors.* [1990] 3 MLJ 103 SC (*fol*)
- e** *Chang Chong Foo & Anor. v. Shivanathan a/l Perumal* [1992] 4 CLJ 1939 (*refd*)
- Moeliker v. R. Reyrolle & Co. Ltd.* [1977] 1 AER 9 (*fol*)
- Tan Lin Siew & Anor. v. Syed Hussein bin Alwi* [1987] 2 MLJ 53 SC (*refd*)
- Croke (a minor) & Anor. v. Wiseman & Ors.* [1981] 3 ALL ER 852 (*refd*)
- Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 1 ALL ER 332 (*refd*)
- Taylor v. Bristol Omnibus Co. Ltd. & Anor.* [1975] 2 ALL ER 1107 (*refd*)
- f** *Pattan a/l Sembadayan v. Periasamy s/o Vellan* [1988] 1 CLJ 826 (*refd*)
- Sundharan a/l Ramasamy & Anor. v. Loo Soon Mook @ Loo Koon Lay & Anor.* [1994] 3 CLJ 385 (*refd*)
- Sum Kum v. Devaki Nair & Anor.* [1964] 30 MLJ 74 (*refd*)
- Liong Thoo v. Sawiyah & Ors.* [1982] 1 MLJ 286 (*refd*)
- Red and Yellow Omnibus Co. Sdn. Bhd. v. Chuah Lay Boon* [1993] 2 CLJ 480 (*refd*)
- Wong Yee Cheong & Anor. v. Toh Seng Chuen* [1988] 2 MLJ xxx (*refd*)
- g** *Eiap Teng Siyum v. Mohd. Noor bin Ibrahim & Anor.* [1988] 2 MLJ xxxi (*refd*)
- Chua Leh Chou & Anor. v. Mohd. Noor bin Ibrahim & Ors.* [1988] 2 MLJ xxxi (*refd*)
- Ho Teck Fah v. Looi Wah t/a Looi Construction* [1981] 1 MLJ 162 (*refd*)
- Abdul Munir bin Haji Abdul Rahman v. Mohamed Adzha bin Hassan* [1985] 2 MLJ cl (*refd*)
- Lee Ann v. Mohamed Sahari bin Zakaria* [1986] 2 MLJ ccxi (*refd*)
- Tarmi bte Sanusi & Anor. v. Yusoff Bashah & Ors.* [1986] 2 MLJ cclvii (*refd*)
- h** *Tan Teck Chye v. Chia Mee Seng* [1988] 2 MLJ xxvi (*refd*)

Legislation referred to:

- Civil Law Act 1984, s. 28(A)
- Civil Law Act 1956, s. 28A(2)(d)(i)
- Road Traffic Rules 1959, r. 10
- Road Transport Ordinance 1958, s. 36(1)

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For the plaintiff - Ranjit Singh; M/s. Ranjit Singh & Co.
For the second defendant - V.T. Singam (Urshela Tharumalingam with him); M/s. V.T. Singam & Co.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

The plaintiff was charged under s. 36(1) of the Road Transport Ordinance 1958 (“RTO”) *vide* summons case No. TS (2) 86-753-90 in the second Magistrate’s Court at Taiping, Perak and after a brief trial the learned Magistrate at the close of the prosecution’s case found that there was a *prima facie* case for the plaintiff to answer and called for his defence under s. 36(1) of the RTO. The plaintiff testified in the witness box and upon hearing the defence, the learned Magistrate amended the charge to one under r. 10 of the Road Traffic Rules, 1959 and convicted him thereof to a fine of RM200. Before the High Court, Ipoh, Perak in civil suit GS No. 25-41-88, the learned trial Judge found the present second defendant 5/6 negligent and the present plaintiff 1/6 negligent. Unfortunately, the decision of the learned trial Judge was reversed on appeal by the plaintiff and the then Supreme Court ordered a retrial before another Judge of the High Court. The plaintiff in encl. 40 then applied before another Judge of the High Court, Ipoh, Perak for civil suit GS No. 25-41-88 to be transferred to the High Court, Taiping, Perak which application was duly heard and the matter was then transferred to the High Court, Taiping, Perak. This was how the case eventually came up before me.

So much for the chequered history of the case.

Now, in his statement of claim (bundle marked “BOP”) the plaintiff briefly stated that on or about 23 November 1986 at about 11.00 a.m. while he was riding motorcycle ABF 4561 from the direction of Kamunting, Taiping, Perak to the direction of Batu Kurau a collision took place between his motorcycle and a motorcar AAY 1675 driven by the second defendant that came from the opposite direction. It was alleged that the collision was caused solely by the negligence of the second defendant and the particulars of that negligence were set out in the statement of claim in great detail.

The plaintiff testified under oath and, in his examination-in-chief, it was established that on the date of the accident he was 24 years of age, a school teacher, and rode that motorcycle on that stretch of the road when he met with an accident. The plaintiff testified that he was alone at the material time and he could not remember the registration number of that motorcar that came from the opposite direction. The plaintiff testified that the accident occurred on his side of the road and that after the accident he fell and lost consciousness. When he regained consciousness the plaintiff testified that he found himself inside a taxi and that taxi was on its way to the Taiping district hospital. I must, at this juncture, make an observation that the plaintiff when asked by his Counsel to give details as to what had happened, contented himself with the following terse statements: “Motokar itu datang daripada arah yang bertentangan daripada Selama ke Kamunting. Saya tidak ingat nombor motokar itu. Kemalangan ini berlaku di bahagian sebelah saya. Selepas kemalangan saya jatuh dan kemudian tidak sedar diri. Bila sedar iaitu sewaktu saya di dalam sebuah teksi di dalam perjalanan ke hospital daerah Taiping.” Under cross-examination he was pressed for details and Mr. V.T. Singam for the second defendant in an unprecedented show of skill exposed the plaintiff as a blatant liar who was willing to lie in Court. The plaintiff was clearly proved to be a liar on about the most material issue in the case, to wit, whether the oncoming car had encroached on his side of the road in negotiating the bend and giving him no opportunity

- a** to avoid the collision. It was established through cross-examination that in his police report (p. 1 of the agreed bundle of documents marked as "AB"), the plaintiff did not tell the police that an accident had occurred between his motorcycle and a motorcar. In that police report the plaintiff merely stated that he rode his motorcycle and after Changkat Larah he did not know what had happened to him. The plaintiff agreed that in his police report there was no mention at all that he was collided into by a motorcar. He too admitted that in his police report there was no mention that the taxi driver had witnessed the accident.
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The Courts have been emphasising on the need to mention relevant facts in one's police report. Thus, in *Wong Ah Sing v. Government of Singapore & Ors.* [1968] 1 MLJ 1, 2, the Court held that if the defendant's story that the plaintiff went to the wrong side of the road was true, yet it was never pleaded nor mentioned in his police report. In *Haron v. Macaulay* [1969] 1 MLJ 169 FC, the Court took into consideration the fact that when the appellant made his police report he had failed to mention the fact that he had given a warning. See related cases like *Nicholas Arthur Nock v. Mohamed Ali bin Suleiman & Anor.* [1976] 1 MLJ 252 CA; *Abdul Mokhti bin Haji Ahmad v. Idris bin Ibrahim* [1977] 2 MLJ 85 and *Wan Norsiah binte Wan Abdullah v. Che Harun bin Che Daud* [1980] 1 MLJ 237, 238. It is obvious that the plaintiff's police report cannot help him at all. It weakens further his case and makes his story less probable.

- d** Reverting back to the examination-in-chief of the plaintiff, it was sought to establish that when the plaintiff regained consciousness in the taxi, the taxi driver spoke to him and he was told that the name of the taxi driver was Abu Samah. The plaintiff testified further, under examination-in-chief, that Abu Samah told him that he (Abu Samah) had witnessed the accident and that though he did not know Abu Samah before the accident yet he was given
- e** Abu Samah's address and now Abu Samah could not be traced. The plaintiff testified that he tried to locate Abu Samah and lately he asked his father to trace Abu Samah and to enquire from Abu Samah's neighbours. All these attempts were said to be futile. The plaintiff further testified, under examination-in-chief, that after the accident he had met twice or thrice the said Abu Samah. The plaintiff narrated that the first encounter was in the taxi, the second encounter was when his father succeeded in tracing him as a witness and the third encounter
- f** was in the High Court, Ipoh, Perak when the case was scheduled for hearing. The plaintiff further testified, and this must surely be his trump-card, that Abu Samah had sworn an affidavit on 13 January 1989 and Mr. Ranjit Singh, his Counsel sought to tender that affidavit as a "P" Exhibit. Mr. V.T. Singam was quick to object and he pointed out, quite rightly, that the maker of the document was not available for cross-examination. Though the proviso to s. 73A(1)(b) of the Evidence Act envisages the situation that the maker need not be called
- g** as a witness if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success, it is I think dangerous to accept and mark the affidavit of Abu Samah as a "P" Exhibit because the process server should give evidence to show that attempts at tracing Abu Samah were made but without success. Bereft of the evidence of the process server, the proviso cannot come
- h** into play. It is germane to mention here that the "Ikatan Dokumen-Dokumen Bagi Defendan-Defendan" marked as "ADB" (agreed defendants' bundle) where, *inter alia*, the notes of evidence as recorded by the learned trial Judge in GS No. 25-41-88 were compiled, surprisingly, do not contain the evidence of Abu Samah. If it was true that he was present during the hearing at the High Court, Ipoh, Perak he should have been called by the plaintiff as Abu Samah's evidence was clearly crucial to the issue of liability. Be that as it may, Abu Samah's
- i** purported affidavit was marked as "IDP5" and for the purpose of this judgment, I am not

prepared to rely on "IDP5" to arrive at my conclusions. Mr. V.T. Singam in cross-examining the plaintiff drove home the point that before the High Court, Ipoh, Perak the plaintiff did not inform the Court that he saw Abu Samah in the Court premises and this was agreed to by the plaintiff. The sum total of it all was that the plaintiff in a desperate bid to salvage his case had lied that Abu Samah was present in the premises of the High Court, Ipoh, Perak when GS No. 25-41-88 was heard by the learned trial Judge.

When cross-examined about the slip of paper purportedly handed to the plaintiff by Abu Samah, the plaintiff buckled under pressure. That cross-examination merits reproduction and it is as follows:

Soalan: Bagaimana pemandu teksi beritahu nama dan alamatnya?

Jawapan: Dia beritahu sepintas lalu dan ada kertas di dalam kocek baju saya, jadi masa orang lain ambil kertas itu saya baru sedar dan mereka tanya saya apa kertas itu.

Soalan: Mana surat yang derebar itu tulis?

Jawapan: Kertas kecil macam mana saya boleh simpan. Orang lain pegang.

Soalan: Siapa itu orang lain?

Jawapan: Saya tidak pasti.

Soalan: Pada masa awak buat laporan polis kertas itu berada bersama-sama awak?

Jawapan: Tidak ada.

Soalan: Mana pergi kertas itu?

Jawapan: Mungkin salah satu saudara saya yang pegang kertas itu.

Soalan: (selepas ADB m.s. 17D di rujuk) Di Mahkamah Tinggi, Ipoh awak kata surat itu di beri kepada ayah dan kemudian hilang. Betul ke?

Jawapan: Saya tidak ingat.

Soalan: Apa maksudnya?

Jawapan: Maksudnya saya tidak ingat keterangan saya di Mahkamah Tinggi, Ipoh.

Soalan: Sekarang awak ingat?

Jawapan: Sekarang pun tidak ingat juga.

Soalan: Awak beri kepada ayah dan hilang atau beri kepada saudara dan tidak tahu apa yang terjadi?

Jawapan: Bagi saya saudara dan ayah pun serupa. Dalam keadaan hendak bagi kertas ini saya tidak tahu.

Soalan: Bila awak tahu surat itu telah hilang?

Jawapan: Itu pun saya tidak dapat ingat sebab saya tidak ambil tahu hal kertas.

In another part of the cross-examination mounted by Mr. V.T. Singam, the plaintiff admitted that Abu Samah was an important personality in the case and the plaintiff denied that he lied in order to get money from the insurance company. The transcript makes for interesting reading. It is as follows:

- a** Soalan: Pendapat awak purported taxi driver itu penting atau tidak?
Jawapan: Penting.
Put: Hari ini awak beri keterangan bohong berkenaan kertas itu dan berkenaan pemandu teksi itu.
Jawapan: Mengapa saya hendak bohong.
- b** Peguam: Oh, ada banyak sebab.
Soalan: Tuntutan hari ini tuntutan apa?
Jawapan: Berkenaan kemalangan iaitu tuntutan wang daripada insurans.
Soalan: Awak mahu wang daripada insurans sebab itu awak bohong?
Jawapan: Tidak.
- c**

In painstakingly cross-examining the plaintiff, Mr. V.T. Singam succeeded in establishing that the plaintiff had given three versions of how the accident took place. The first version was as stated in the police report and as adverted to earlier that the plaintiff did not know what had happened to him. The second version was in the High Court, Ipoh, Perak when the plaintiff testified that the motorcar had encroached slightly into his side of the road and collided with his motorcycle. The third version was in the Magistrate's Court, Taiping, Perak where the plaintiff testified that he lost control of his motorcycle and he fell.

- d**
- e** Now, in regard to the second version in the High Court, Ipoh, Perak, this was what the plaintiff said under cross-examination (see "ADB" p. 16E): "Motokar itu memakan jalan saya sedikit dan bertembung dengan bahagian sebelah kanan motosikal saya. Kurang pasti sama ada atau ta' barisan tengah di situ. Pada masa perlanggaran motosikal saya ada sebelah kiri jalan saya. Saya berada di tengah-tengah sebelah kiri jalan saya."

The third version as propounded by the plaintiff in the Magistrate's Court, Taiping, Perak added an entirely different complexion to the plaintiff's case. There the plaintiff in his defence to the charge under s. 36(1) of the RTO under examination-in-chief, at "ADB" at p. 9 at column C recounted vividly that:

- f** Pada 23 December 1986 saya dalam perjalanan ke Selama, sampai selekoh, kemalangan berlaku. Kelajuan saya 30-40 km/j. Tapi selekoh itu tajam, ada pasir dan minyak lagi. Saya tak dapat kawal motosikal saya. Tulang belakang saya cedera. Selepas kemalangan saya sudah tak tahu apa. Jalan itu berpasir dan banyak minyak hitam di sana. Masa berlaku kemalangan saya berada di jalan saya. Saya jatuh mungkin sebab pasir.

- g** Under cross-examination before the learned Magistrate the plaintiff categorically stated, *inter alia*, that : "Saya tak setuju tempat itu tiada pasir." Bluntly put, the plaintiff before the learned Magistrate saw it fit to blame the slippery road as the cause and effect of the accident that led to his misfortune when he negotiated the bend at that stretch of the road.

- h** Mr. V.T.Singam next mounted a piecemeal cross-examination of the plaintiff and strenuously put across to the plaintiff that the evidence of the plaintiff in the Magistrate's Court, Taiping, Perak was the true account of how the accident had occurred. The plaintiff denied that it was so and stated that it was the police that asked him to give that kind of evidence before the learned Magistrate. Under re-examination, the plaintiff stated that he could not remember the name of the policeman but he could recognise the individual concerned. When pressed further as to why the plaintiff followed the advice of the police, the plaintiff replied: "Pegawai pendakwa itu kata kalau saya buat demikian hukuman saya boleh diringankan dan dia menyatakan sekarang dah masuk r. 10, jadi keterangan saya ini tidak lagi melibatkan insuran.
- i** Jadi setelah kes ditukar kepada r. 10, baru mengaku."

The second defendant, a 38 years old sundry goods shop assistant testified, in examination-in-chief, that he drove motorcar AAY 1675 from the direction of Ijok to Taiping (the same as from the direction of Batu Kurau as reflected in the sketch plan at p. 5 of "AB") and on arrival at the scene of the accident, he drove slowly as there was a bend in the road. He saw a motorcycle coming fast from the opposite direction and when the motorcycle reached the bend it fall causing the motorcyclist to be thrown off the motorcycle whilst the motorcycle itself skidded, entered his path and knocked into his motorcar particularly the front right side wheel. The second defendant's attention was drawn to the evidence of the plaintiff and he was asked whether he collided into the plaintiff and whether he had encroached into the plaintiff's side of the road. To these two questions, the second defendant emphatically denied. Next, the second defendant's attention was drawn to the particulars of negligence in the statement of claim at "BOP" p. 2 and the second defendant again emphatically denied that he drove at an excessive speed and he further denied that he had encroached into the rightful path of the plaintiff whilst negotiating the bend. The second defendant further denied that he had suddenly and without warning swerved his motorcar into the path of the plaintiff and in doing so he denied that he gave the plaintiff no opportunity to avoid the collision.

The second defendant further testified, in examination-in-chief, that when he first saw the motorcyclist fell off the motorcycle it was about 10 feet to 12 feet away. After the accident the second defendant moved his motorcar to the left edge of the road and off the metal road because he did not want to obstruct the flow of traffic in that area. In my judgment, the civic consciousness of the second defendant in moving his motorcar to the left edge of the road should be commended though there were attempts, in the course of cross-examination, to show that there was no necessity in doing so because at that time the flow of traffic was negligible. But one thing was certain - that the motorcycle was not moved after the accident and this was not disputed by the parties. In fact, under examination-in-chief, the second defendant testified that when he reversed his motorcar to move it off the metal road it did not get entangled with the stationary motorcycle (see "AB" 3 D,"AB" 4 I and "AB" 4 J showing the in situ positions of the motorcycle after the accident).

The second defendant continued, under examination-in-chief, that after he had moved his motorcar off the metal road, he waited for about 10 minutes before a passing vehicle arrived. He hailed that vehicle to stop but it refused to comply. Thus, the second defendant was compelled to wait for another 30 minutes before a vehicle stopped and sent the plaintiff to the hospital. The second defendant was quite emphatic that he did not know the type of vehicle nor the colour of the vehicle that stopped to pick up the injured plaintiff. It was approximately 10 minutes after the plaintiff was sent to the hospital that the police party arrived and the second defendant then accompanied the police to the police station and there he lodged his police report as per "AB" 2 where that report was marked as D6. In that police report the second defendant vividly described the accident in these words:" "... saya sampai di satu selekoh di Batu 8, Jalan Batu Kurau, Kamunting, tiba-tiba saya lihat di hadapan saya sebuah motosikal tersebut mengelusur ke arah motokar saya." The second defendant also denied as incorrect, under examination-in-chief, that the plaintiff was taken to the hospital in a taxi.

Under cross-examination, the second defendant denied that he had encroached into the plaintiff's path thereby causing the right side of the handle of the motorcycle and its right signal light to collide with the bonnet and the mudguard of the motorcar. The second defendant also denied that the impact of such collision had caused the plaintiff to fall from his motorcycle. When the second defendant was confronted with the notes of evidence recorded by the learned trial Judge in the High Court, Ipoh, Perak he denied making such

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a statement. The second defendant also adopted the same attitude when he was confronted with the notes of evidence recorded by the learned Magistrate in the Magistrate's Court, Taiping, Perak. The second defendant also disagreed that it was a taxi that brought the plaintiff to the hospital.

b Under re-examination, the second defendant agreed that the notes of evidence as recorded by both the High Court, Ipoh, Perak and the Magistrate's Court, Taiping, Perak were correct. He respected the learned trial Judge and the learned Magistrate of both Courts. He stated that the accident occurred some nine years ago and when he gave evidence in both the High Court, Ipoh, Perak and the Magistrate's Court, Taiping, Perak it was about four to five years' earlier and that he could not remember what he had said in those two Courts. The second defendant, however, was emphatic when he said that he could not remember the details of the accident but he was positive that the "... motosikal tergelongsor dan hentam motokar - itu saya pasti. Sebelum motosikal jatuh dan sebelum penonggang itu jatuh saya boleh confirm handle motosikal tidak sentuh motokar saya (demeanour elok)."

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The amended statement of defence re-dated 27 September 1994 and marked as "BOP1" reflected the case for the defence. In para. 1 thereof it was averred, *inter alia*, that the motorcycle skidded and the plaintiff rider fell and that motorcycle then dragged/pushed towards the second defendant's side of the road and collided into the motorcar driven by the second defendant. In para. 2 thereof it was averred, *inter alia*, that the accident was caused wholly/entirely by and/or contributed to by the negligence of the plaintiff and the particulars of negligence or contributory negligence of the plaintiff were itemised thereunder. The germane parts of those particulars would be this. It was averred that the plaintiff lost control of the motorcycle thereby causing him to fall off the motorcycle and that motorcycle eventually encroached into the lawful path of the second defendant and collided with the motorcar driven by the second defendant. It was also averred that in negotiating the bend the plaintiff skidded and lost control of the motorcycle.

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From the evidence, both parties blamed each other for the accident. It is quite common for both parties to give diametrically opposing evidence (*Mohd. Tajuddin bin Salleh v. Mokhari bin a/l Murgis & Anor.* [1993] 3 CLJ 42) and, in such a situation, the only way to resolve the impasse and to ascertain as to how the collision occurred, the photographs, plan and measurements of the scene, and the nature of the damage to each vehicle must surely provide the most relevant guide by which those opposing reasons could be tested (*San Seong Choy & Ors. v. Yusof Bien* [1962] MLJ 427).

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From photograph D at "AB" p. 3 it is clear that the motorcycle was lying on its left side and this was consistent with the evidence of the second defendant that he saw the plaintiff thrown off his motorcycle and the said motorcycle also fell to its left side. Before the Magistrate's Court, Taiping, Perak (see "ADB" at pp. 2 to 5) Sergeant Ismail gave evidence and there he stated that there was a scratch mark that started on the plaintiff's side of the road and ended and encroached right into the second defendant's side of the road. This piece of damning evidence found support in the sketch plan drawn by the said Sergeant at "AB" p. 5. Now, recalling what the plaintiff had said before the learned Magistrate that because of the sand and the oil on the road his motorcycle skidded and he was thrown off his motorcycle, two things immediately come to the forefront. Firstly, the scratch marks on the road must have been caused by the motorcycle when it skidded right into the lawful path of the second defendant. Secondly, the plaintiff must have sustained the fracture dislocation of the 5th cervical vertebra when he was thrown off the motorcycle. It is also pertinent to note that, under cross-examination, the said Sergeant gave the following evidence:

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|----------------|---|---|----------|
| Defendan | : | Pintu pemandu kereta kemek, betul atau tidak? | a |
| PW1 (Sergeant) | : | Tidak kemek. | |
| Defendan | : | Adakah dari siasatan anda, motosikal saya jatuh sebelum kemalangan? | |
| PW1 (Sergeant) | : | Benar. | |
| Defendan | : | Motosikal (it should read motokar) itu adakah ada bengkok di bahagian bonet hadapan? | b |
| PW1 (Sergeant) | : | Bila motosikal jatuh, ia meluncor ke depan, kereta dari depan datang. Jarak kesan motosikal jatuh ke tempat ia berada di rajah ialah 9 meter 70 cm. | |

There was undisputed evidence that the motorcycle was not moved after the accident and the position of the motorcycle as reflected in the sketch plan located more to the lawful path of the second defendant tells a damning story as to the negligence of the plaintiff. **c**

It is my judgment that the plaintiff failed to prove negligence on the part of the second defendant (*Neo Chan Eng v. Koh Yong Hoe* [1960] 26 MLJ 291; *Ng Chui Sia v. Maimon bt Ali* [1983] 1 MLJ 110; and *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ FC 175). It is my judgment too that the motorcycle skidded due to the slippery road and because the motorcycle was speeding and at the same time negotiating the bend the plaintiff must have lost control of the motorcycle. The plaintiff too was thrown off his motorcycle as the motorcycle skidded thereby sustaining the fractured 5th cervical vertebra. I unhesitantly accepted the second defendant's version of how the collision occurred and rejected that of the plaintiff rider. I would add that the impression the second defendant made upon me as he testified from the witness box was that of a witness of truth. He gave concise and frank evidence. On the other hand, the impression the plaintiff made upon me was quite the opposite. The plaintiff was indeed wholly negligent and he was the author of his own misfortune. **d**

Lest I be accused that I have over emphasised on the demeanour of the second defendant, I am aware and always mindful of what Ong Hock Thye FJ, said in *Ah Mee v. Public Prosecutor* [1967] 1 MLJ 220 especially at p. 223 that: **e**

To avoid undue emphasis on demeanour, it may be well to remember what was said by Lord Wright, and often quoted, from his judgment in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 267 of the possibility of the Judges being deceived by adroit or plausible knaves or by apparent innocence. **f**

Upon scrutiny of the totality of the evidence, I could safely draw the following inferences: **g**

- (1) the plaintiff was speeding before reaching the bend and upon reaching it he lost control of the motorcycle ridden by him. **h**
- (2) as the plaintiff lost control of the motorcycle, that motorcycle skidded and this caused the plaintiff to be thrown off the motorcycle whilst at the same time the motorcycle fell to its left side and encroached into the lawful path of the second defendant. **i**
- (3) as the second defendant approached the bend along his lawful side of the road he reduced speed and saw to his consternation the motorcycle travelling at a fast speed and then he witnessed the skidding of the motorcycle and the fall of the plaintiff motorcyclist onto the metal road. He too saw the motorcycle skidded on its left side and came suddenly to his path creating a situation of emergency where in the agony of

- a* the moment when exposed to danger the second defendant had no choice but to face it and what the second defendant did cannot fairly be treated as negligence (*Govinda Raju v. Laws* [1966] 1 MLJ 188).

For these reasons, I am impelled to hold the plaintiff to be wholly negligent.

- b* It is rather unfortunate that the plaintiff failed to plead contributory negligence and instead relied solely on the issue of negligence to rest his case. ("The statement of claim alleged against the defendant driver total negligence - it was either that or nothing" per H.T. Ong CJ, in *Menah binti Sulong v. Lim Soo & Anor.* [1983] 1 CLJ 26). No doubt I am sympathetic to him but I cannot and must not indulge in it. The law is clear. He who asserts must prove. In all cases of negligence the onus of proof rests with the plaintiff (*Neo Chan Eng v. Koh Yong Hoe* (*supra*)). Perhaps it is appropriate to echo the words of Ong CJ, Malaya (as he then was) in *Wong Thin Yit v. Mohamed Ali* (*supra*) when his Lordship said in vivid words:
- c*

I deeply sympathise with the unfortunate child but hard cases make bad law. It is not within the discretion of this Court to let sympathy lend weight to the evidence on either side.

- d* There is one other point that needs mention. It is this. The plaintiff, a school teacher, regrettably gave three versions as to how the accident took place. He underrated the importance of telling the truth in not only his police report but also before the two Courts - one, the High Court, Ipoh, Perak, and the other, the Magistrate's Court, Taiping, Perak. Ajaib Singh J, (as he then was) in *Public Prosecutor v. Bhandulananda Jayatilake* [1981] CLJ 43 spoke of the importance of telling the truth in a Court of law. There, his Lordship said this:

- e* Witnesses giving evidence in Court must never underrate the importance of speaking the truth. A Court of Justice is the sanctuary of truth where serious issues of law and fact are heard and determined. The law prescribes that witnesses on oath must tell the truth, the whole truth and nothing but the truth. True testimony alone would assist the Court in arriving at a true verdict. It is more important therefore that people who appear as witnesses in Court should never deviate from the truth for otherwise they would be polluting the administration of justice and thus committing a serious wrong to the Court and to society. The obligation imposed on a witness to speak the truth under oath has the sanction of law. And very likely of religion as well. An oath which a witness takes in Court is a solemn declaration by which the witness may well be invoking the wrath and vengeance of God in addition to any punishment which may be inflicted on him under the laws of the land if he does not speak the truth.
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- g* In my judgment, on the evidence adduced the plaintiff has hopelessly failed to establish any negligence on the second defendant's part and I accordingly dismissed his claim with costs.

- h* On the question of quantum of damages, it is next to impossible to award an accurate figure but I must venture to make an award which would compensate the plaintiff for the pain and suffering he has undergone and will in all probability, continue to undergo. Towards this end, I have drawn my attention to the cases which both Mr. V.T. Singam and Mr. Ranjit Singh cited to me in their submissions. I have at the same time not lost sight of the fact that sums which I propose to award must, in all the circumstances, be a fair sum to compensate the plaintiff for the injuries sustained but it should not in any way be too excessive as to constitute an injustice to the second defendant. Mohamed Azmi FJ, in *Tay Tong Chew & Anor. v. Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50 puts it rather well when dealing with the subject on the quantum of damages and I need do no better than to quote his Lordship's sage words. This is what his Lordship said:
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Although it is almost impossible to standardize damages for pain and suffering and loss of amenities in running down cases, it is in the interest of all concerned that the trend of awards should be maintained so that Insurance Companies and practitioners have some idea as to how these cases will ultimately be dealt with here. This will facilitate out of Court settlement or at least agreement on quantum and will no doubt benefit road victims (see *Seenivasan & Anor. v. Lim Yew Seng* [1961] MLJ 22).

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Now, for the agreed special damages comprising of RM28 being fee for police report, RM10 being fees for RIMV particulars, RM40 being fees for medical reports from Taiping hospital, RM25 being fee for the specialist report, RM420 being the cost of the wheel chair and RM270 being further fee for the specialist report - such sums were magnanimously agreed by both parties and, accordingly, I made orders to that effect.

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On loss of earnings at item (e) of para. 4 of the statement of claim it was listed as: "Loss of earnings from date of accident to 28 February 1988 at RM640 per month totalling RM9,600" whereas item (f) of para. 4 of the statement of claim to be: "Loss of earnings from 1 March 1988 and still continuing." It was argued by Mr. Ranjit Singh that there was evidence of loss of earnings for approximately 1 year and 8 months and that for the actual pre-trial loss of earnings the Court should not take consideration any expenses which the plaintiff may have incurred and he then cited s. 28(A) of the Civil Law Act 1984. I agree with the first part of his submission that the plaintiff did not receive his salaries as a teacher for 1 year and 8 months - it amounts to a total of 20 months. But I disagree with the second part of his submission because surely the Court is entitled to take into account that out of RM640 per month salary, the plaintiff must have utilised half of it amounting to RM320 per month for living expenses and the Court is entitled to deduct those sums when computing the appropriate figure under this head. Mr. Ranjit Singh conveniently overlooked the amendment to the Civil Law Act 1984 that took place on 1 October 1984 where by such an amendment there is no longer any distinction between pre-trial and post-trial loss of earnings (see the decision of Gunn Chit Tuan SCJ, (as he then was) in *Dirkje Peiternella Halma v. Mohd. Noor bin Baharom & Ors.* [1990] 3 MLJ 103 SC). Thus, on a figure of RM320 per month for 20 months the figure of RM6,400 was arrived at and this must surely be the amount for loss of earnings incurred by the plaintiff and I so ordered accordingly. In *Chang Chong Foo & Anor. v. Shivanathan a/l Perumal* [1992] 4 CLJ 1939 SC, Harun Hashim SCJ, (as he then was) speaking for the then Supreme Court at p. 19 had this to say:

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In the instant case, the appellants rely on the respondent's admission that he spent RM60 p.m. on petrol to go to work and RM5 p.d. for meals while at work as his living expenses which should be deducted in assessing damages for loss of future earnings under s. 28A(2)(c)(iii). We agree that this is a fair deduction in the circumstances of this case. The appeal on quantum is allowed.

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I arrived at the figure of RM320 per month for the living expenses of the plaintiff based entirely on the evidence as adduced in Court. There was evidence that the plaintiff had to pay for one month's supply of his motorcycle petrol at RM60, for one year road tax and insurance at RM130 (approximately RM10 per month), for one month's food consumption at the school canteen at RM50, for one month's outing as a bachelor at RM120 and, lastly, for the cost of his monthly cigarettes at RM90. The sum total was approximately RM330 and I rounded it up to RM320 per month.

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On loss of earning capacity at item (g) of para. 4 of the statement of claim, I need to refer to the legal principle as set out in *Moeliker v. R. Reyrolle & Co. Ltd.* [1977] 1 AER 9, viz:

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- a* In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the Court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the Court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate.
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- c* This very same principle found favourable with the then Supreme Court of ours and it was cited with approval in *Tan Lin Siew & Anor. v. Syed Hussein bin Alwi* [1987] 2 MLJ 53 SC. Translating the principle enunciated in *Moeliker* to the facts of the present case, we do not have an iota of evidence to show that there is substantial, let alone a real risk, that the plaintiff would lose his Government job as a teacher at some time before the estimated end of his working life. Bereft of this kind of evidence, how could this Court assess the plaintiff's
- d* loss of earning capacity? As a Government teacher, the worst that could happen to the plaintiff is that he might be medically boarded out but, here unfortunately, there was no evidence to support such an assumption. The Malaysian Government is a Government with a heart. I can take judicial notice of this by the recent election results that put the Barisan Nasional to the fore. The plaintiff should not worry unduly about his loss of earning capacity. Be that as it may, on the available evidence I am constrained to hold that the plaintiff has not proved
- e* his entitlement under this head purely on the principle of *Moeliker*. For the aforesaid reasons, no award was made under this head. However, I am not unmindful of the *penyata gaji* issued by the Sekolah Kebangsaan Pak Ba, Terengganu in regard to the salaries received by the plaintiff for the years 1985, 1986 and 1987 and at the foot note thereof there was a startling note which reads: "Gaji bersih bulat Disember 1987, Januari 1988 dan Februari 1988 telah di tarik balik oleh Jabatan Pendidikan Terengganu." (see p. 13 of "AB"). Relying on such
- f* evidence, Mr. Ranjit Singh submitted that there was a possibility, in the future, that the plaintiff might find himself in the same predicament where his salary would be withdrawn entirely. However, with respect such sweeping submission was entirely baseless. The Education Director was not called to establish as to whether the plaintiff might once again in the future or in the near future suffer the fate of having his salary withdrawn. It is pertinent to note that Dr. R. Balakrishnan (his evidence before the High Court, Ipoh, Perak in "ADB" at pp. 12 to 13 was accepted by both parties without having to call him again and he was accordingly given the privilege of being "SP1") in his report dated 26 February 1988 at p. 11 of "AB" categorically stated like God, in relation to the plaintiff, that: "He is wheel chair dependent and will not be able to engage in any occupation." I do not deny that the plaintiff is still wheel chair dependant but he is actively engaged as a Government teacher and there was no documentary evidence at all that the plaintiff was either unable to perform his duty as a teacher or for that matter that his position as a teacher would be threatened by possible dismissal. On a re-appraisal of the evidence, again I could not accede to Mr. Ranjit Singh's submission and, consequently, no award was made under this head.
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- h*
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In regard to item (i) of para. 4 of the statement of claim where the plaintiff claimed for travelling expenses from Taiping, Perak to Ipoh, Perak for medical treatment, there was evidence that the plaintiff went to the hospital at Ipoh for physiotherapy on eight (8) occasions only and for these visits a sum of RM600 should be fair and reasonable in the circumstances. An award to that effect was accordingly made.

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In regard to item (j) of para. 4 of the statement of claim where the plaintiff claimed for cost of nursing care, the principles enunciated in the following cases were relied upon by me. In *Croke (a minor) & Anor. v. Wiseman & Ors.* [1981] 3 ALL ER 852, it was held, *inter alia*, that it could be assumed that the infant's parents would remain able throughout his life to house, feed and care for him and the award for loss of future earnings was required to provide a home for him in the future and for his care and such extra comforts as he could appreciate. If however, the award for future nursing care had included the full cost of residential care, the award for loss of future earnings would have had to be small to avoid awarding the infant his future living expenses twice over. Lord Diplock, in *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 1 ALL ER 332, held that as the plaintiff doctor was unmarried with no one dependent on her nor likely to be, then and in such case damages for nursing care must provide for the cost of nursing and attendance and keep for the rest of her days. The sum must include not only the outgoings on doctors, nurses, medicines and the like but also a sum of food and nourishment and to recompense the mother and staff, and a proportion of the outgoings on the house and so forth. Finally, in *Taylor v. Bristol Omnibus Co. Ltd. & Anor.* [1975] 2 ALL ER 1107, the Court held that compensation for the mother's services was recoverable irrespective of whether or not the mother had to give up outside employment to care for the plaintiff.

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Dr. R. Balakrishnan in his medical report at p. 11 of "AB" stated in relation to the plaintiff that: "He would require the help of another, in attending to his personal needs-bathing, cooking, toilet, etc." In Court, the plaintiff agreed that RM400 was paid to his brother-in-law to look after him particularly to take care of his food and also for rental of a room. This by itself takes it outside the normal nursing care or the normal services rendered for nursing care. The plaintiff agreed that he could feed himself; that he could bath himself and he would only call his brother-in-law for help if he needed his help. He agreed that his brother-in-law run a coffee shop and that coffee shop was located near his brother-in-law's house. In *Pattan a/I Sembadayan v. Periasamy s/o Vellan* [1988] 1 CLJ 826, the plaintiff could not come to Court to give evidence because of his severe head injury. The Neurosurgeon gave evidence that the plaintiff was unable to speak coherently and required full time care of an adult in his daily activities. Another Neurosurgeon concluded that the right hemiplegia resulting from the brain injury, affecting primarily the left hemisphere will continue to be a permanent deficit on the plaintiff and there was also an altered personality. The CT scan of the brain showed cerebral atrophy. Mustapha Hussain J stated at p. 829 of the judgment that: "The plaintiff can attend, though slowly, to his daily needs, except for zipping up his trousers and buttoning his shirts, a chore easily taken care of by the other members of his family. In the case of *Yang Salbiah v. Jamil bin Harun* [1981] 1 MLJ 292, the plaintiff there was a female whereas in the instant case the plaintiff is a male whose wife is always at his side. As in *Cunningham v. Harrison* [1973] 1 QB 942, the extra marital duty imposed on the wife required some compensation. The Court felt it was not unreasonable to make a nominal award on this item of RM50 per month." Unlike the married plaintiff in *Pattan*, the plaintiff here is a bachelor and he did not have any head injury. The plaintiff here sustained fracture dislocation of the 5th cervical vertebra and according to Dr. R. Balakrishnan at p. 12 of "ADB" the plaintiff "has lost his sensation for feeling from below his chest all the way." But the said doctor

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a admitted, under cross-examination, that he did not know whether the present condition of the plaintiff was the same since he did not see the plaintiff after 1988. In my judgment, the plaintiff here is in a better medical condition than the plaintiff in *Pattan* because the plaintiff here gave evidence in Court in a wheel chair and he was acutely aware that he gave evidence for the purpose of claiming damages for himself. It was for this reason that Mr. V.T. Singam suggested a sum of RM50 for 16 years under this head.

b In *Sundharan a/l Ramasamy & Anor. v. Loo Soon Mook @ Loo Koon Lay & Anor.* [1994] 3 CLJ 385, the plaintiff who had to be cared for by his mother and his mother gave evidence in support of his claim for nursing care awarded pre-trial nursing care for 90 months at RM24,840 and for future nursing care for 10 years at RM33,120. Sundharan sustained head injury and he was paralysed and he could walk with a funny gait. Mr. V.T. Singam used *Sundharan* as a guideline and submitted that the plaintiff here should not throw the damages to the Court but he should prove it and vigorously applied *Sum Kum v. Devaki Nair & Anor.* [1964] 30 MLJ 74.

Mr. Ranjit Singh submitted that the bachelor plaintiff needed someone to move him around in the wheel chair and he submitted that it was quite obvious that the plaintiff needed nursing care. I was then referred to *Liong Thoo v. Sawiyah & Ors.* [1982] 1 MLJ 286, where the plaintiff there sustained severe head injury and suffered complete loss of memory for both recent and past events. Her mother-in-law had to attend to her daily needs and for that the Court awarded RM22,400 and RM29,904 for the value of future services. Mr. Ranjit Singh suggested RM200 per month using the multiplier of 16 since the plaintiff was below 30 years of age at the time of the accident (see s. 28A(2)(d)(i) of the Civil Law Act, 1956 and the case of *Red and Yellow Omnibus Co. Sdn Bhd. v. Chuah Lay Boon* [1993] 2 CLJ 480). I agree with Mr. Ranjit Singh and, even though the brother-in-law did not give evidence for the plaintiff, I awarded RM200 per month using a multiplier of 16 which gave a figure of RM38,400.

For general damages, in particular:

- (1) laceration wound over the chin; and
- (2) abrasion wounds over the right shoulder, left wrist, left forearm and right side of face (see p. 7 of "AB").

f Mr. V.T. Singam suggested a figure of RM1,500. The comparables relied upon were *Wong Yee Cheong & Anor. v. Toh Seng Chuen* [1988] 2 MLJ xxx, where for multiple lacerations and abrasions Eusoff Chin J, (as his Lordship then was and now the Chief Justice of Malaysia); *Eiap Teng Siyum v. Mohd. Noor bin Ibrahim & Anor.* [1988] 2 MLJ xxxi, for lacerations on face, right elbow and right knee Abdul Malek Ahmad J, awarded RM1,000 and in *Chua Leh Chou & Anor v. Mohd. Noor bin Ibrahim & Ors.* [1988] 2 MLJ xxxi, Abdul Malek Ahmad J, awarded RM1,000 for multiple facial lacerations. Mr. Ranjit Singh agreed to the figure as suggested by Mr. VT Singam and, consequently, an order to that effect under this head was made by me.

g For fracture dislocation of the 5th cervical vertebra (see p. 7 of "AB"), I need to refer to several comparables. Thus, in *Ho Teck Fah v. Looi Wah t/a Looi Construction* [1981] 1 MLJ 162, where the plaintiff sustained injuries to his cervical spine and became paralysed waist downwards and was confined to the wheel chair and the medical report indicated that the plaintiff's injuries were of a permanent nature and that he was unlikely to use his lower limbs and that it was obvious that he would never walk again, the Court awarded for pain and suffering and loss of amenities as agreed by the parties at RM70,000. In *Abdul Munir bin Haji Abdul Rahman v. Mohamed Adzha bin Hassan* [1985] 2 MLJ cl, where the plaintiff

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sustained a fracture of the 4th cervical vertebra which resulted in paralysis of both his lower limbs with loss of sensation below the level of the 4th thoracic dermatome. The plaintiff became paraplegic and he was said to be irrecoverable. The paralysis started almost from the collar bone downwards, and it affected both the plaintiff's arms which could not be moved. The upper limbs are now fully recovered. He has no good control of the bladder and is on a condom drain. His sexual function was said to be considerably reduced to about 25%. The Court awarded the plaintiff RM120,000 for pain and suffering on a 100% basis. In *Lee Ann v. Mohamed Sahari bin Zakaria* [1986] 2 MLJ ccxi, for fracture of a thoracic vertebra causing paralysis from the waist down the Court awarded RM70,000. In *Tarmi bte Sanusi & Anor. v. Yusoff Bashah & Ors.* [1986] 2 MLJ cclvii, the Court awarded RM80,000 to the first plaintiff who sustained a traumatic paraplegia due to a compression fracture of 11th thoracic vertebral body which showed marked wedging and was displaced posteriorly. In *Tan Teck Chye v. Chia Mee Seng* [1988] 2 MLJ xxvi, for (a) depressed fracture of right parietal bone with contusion of the right parietal lobe (b) fracture dislocation of the third and fourth thoracic vertebrae with paraplegia and loss of sensation below T4 and (c) loss of bladder and bowel function, the Court awarded RM110,000 for pain and suffering and loss of amenities. These comparables were certainly of immense help to me at arriving at a fair and reasonable award under this head. Dr. R. Balakrishnan in his report dated 26 February 1988 at p. 10 "AB" painted a rather gloomy picture of the plaintiff's central nervous system. The doctor stated that:

The cranial nerves were intact. Peripherally, there was absent touch and decreased pain sense appreciation in the upper limbs, below the mid-forearm level and in the chest from the level of the clavicle downwards to the feet.

There was wasting of muscles of both hands.

Passive movements were full in all the limb joints, but actively there was poor movements in the wrists and fingers and in both ankles.

The power of movements were:

Proximal to forearm - Grade 5 (Normal)

Wrist and fingers - Grade II

Lower limbs - Grade II to Grade III

The reflexes in the lower limbs were exaggerated.

He could just about stand unaided. He could walk a few step holding onto a chair. He came for the examination in a wheel chair.

Radiographs showed a burst fracture of body of 5th cervical vertebra with posterior shift of the fragments.

The doctor gave his conclusions and opinions thus:

Encik Mohd Yusof sustained laceration of chin, abrasions and dislocation of 5th cervical vertebra.

The external injuries have healed. The fracture of body of 5th cervical vertebra has healed in a displaced position.

There has been displacement of the fragment onto the cervical portion of the spinal cord, causing wide spread neurological changes and hence disability. He has weakness of both hands and both lower limbs, decreased sensation below the upper chest level and inability to control bladder or bowel function.

a He is wheel chair dependent and will not be able to engage in any occupation.

He would require the help of another, in attending to his personal needs - bathing, cooking, toilet etc.

b The plaintiff gave evidence before me on two occasions. The first time was on 25 October 1994 and the second time was on 30 December 1994 when I had to return back to Kuala Kangsar as the High Court, Taiping was stationed there. This was necessary since by 1 November 1994, I was transferred to the High Court, Johor Bahru. Finally, on 20 May 1995 with the kind permission of the Chief Judge (Malaya) I finally completed hearing this case. Between 26 February 1988 to 30 December 1994 there was a span of 6 years 10 months 4 days and relying on Dr. R. Balakrishnan's evidence in "ADB" at p. 13 it would be fair to assume that the plaintiff was last examined by the said doctor on 26 February 1988. No wonder the plaintiff has since improved - bounced back to life so to speak. He can now continue to teach. He can also feed himself, bath himself and can even manoeuvre himself rather well in the wheel chair as he entered the Court room. God certainly has a say in the well-being of the plaintiff, something which even Dr. R. Balakrishnan could not foresee. Taking into consideration all the factors put before me, for the pain and suffering and loss of amenities a sum of RM90,000 was awarded. It seems that both parties are happy with this figure.

d To summarize, on the basis of full liability, the plaintiff would have been entitled to :

<i>e</i>	(1) the agreed special damages as itemised in the early part of this judgment ...	=	RM 1,093
	(2) loss of earnings ...	=	RM 6,400
	(3) travelling expenses from Taiping to Ipoh...	=	RM 600
	(4) cost of nursing care ...	=	RM38,400
	(5) laceration wound and abrasion wounds ...	=	RM 1,500
	(6) fracture dislocation of the 5th cervical vertebra ...	=	RM90,000

f It must be reiterated that no award was made for loss of earning capacity as there was lack of proof.

I would award interest at the rate of 6% for general damages from date of service of writ to judgment and 8% until date of realisation. The agreed special damages to attract interest at the rate of 4% from date of accident to the date of judgment.

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